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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 119

ADVANCE TRANSPORTATION COMPANY, a corporation,

Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Reply Brief

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The Facts.

On pages 23 to 33 of its petition and brief, the defendant pointed out some twelve or more instances in which the Circuit Court of Appeals, in its opinion, overlooked or misapprehended the controlling facts as shown by the plaintiffs' proof and wherein the court was in error in its statement of the facts. The plaintiffs have made no answer to this portion of the defendant's brief.

Although the plaintiffs accuse the defendant of not having stated all of the pertinent facts and of misstating some of the evidence, they have not, in their supplemental statement, pointed to any evidence in the record which even tends to support the misstatements made by the Circuit Court of Appeals. Nor have they even claimed the facts to be as stated by the court, except in one instance and that only by way of conclusion. At the

bottom of page 2 of their brief the plaintiffs state, with reference to the defendant's driver, Reid, that he "abandoned his truck and went across the highway with a lighted fusee in his hand and stood beside the mired truck on the west side of the highway helping to protect southbound traffic (R. 85)." But the testimony appearing on page 85 of the transcript, to which the Court is referred, or on any other page for that matter, does not support this conclusion. There is no evidence that Reid "abandoned" his truck, or that he was "helping protect southbound traffic." The plaintiffs' proof is that there was no southbound traffic to protect.

Nor have the plaintiffs pointed to any additional facts which justify the judgment of the court. Near the top of page 2 of their brief they state by way of conclusion with reference to the defendant's drivers stopping their trucks: "There was no necessity for stopping where they did." They point to the testimony of the driver of the Bartzen truck that another truck had pulled off onto this shoulder and then went on. But that was sometime before the defendant's trucks arrived. Furthermore, this testimony was not proof that the shoulder was sufficient to sustain the weight of the defendant's trucks, but merely that the driver of that truck was lucky in that his truck did not mire down. When the defendant's trucks arrived, the drivers were confronted with the obvious fact that the Bartzen truck had mired down into the shoulder and was unable to get back onto the pavement. They were, therefore, justified in concluding that the shoulders were soft and would not sustain the weight of their trucks, loaded as they were, and that it was not practical for them to pull their trucks off the pavement onto the shoulder.

Nor does the plaintiffs' evidence to the effect that after the accident a tow truck and certain automobiles

used this shoulder furnish any proof that it was sufficiently solid to sustain the weight of the defendant's trucks. On the contrary, if this evidence tends to prove anything, it proves that the plaintiffs had not only 30 or more feet of clear pavement to the left of the defendant's trucks on which to pass them, had the plaintiffs been at all observant, but, in addition thereto, two shoulders, 9½ feet in width according to the plaintiffs, which they might have made use of for that purpose. Plaintiffs' proof shows that traffic was not interfered with, that it was not practical for the defendant's trucks to drive onto the shoulder, and that there was no violation of the statute referred to.

In the second paragraph on page 3 of the plaintiffs' brief, they state: "At no time prior to the collision in question did any of the truck drivers of the defendant put out any flares or fusees near or around or behind any of the defendant's trucks." That, of course, is immaterial. Under the pleadings there was no duty on the part of the defendant to put out any flares or fusees unless the statute referred to in sub-paragraph 9 (h) of the plaintiffs' complaints was applicable. As is pointed out on pages 77 to 80 of the defendant's petition and brief, the statute alleged to have been violated could have no application since there was no proof that the defendant's trucks and their lighting equipment were disabled at the time of the occurrence. The plaintiffs' proof is that such was not the fact.

On page 4, in the last paragraph of their supplemental statement, the plaintiffs state with reference to the fusees: "These flares cast a red glow into the atmosphere and over the landscape, causing the red body of the truck to blend into the surroundings so as to make it undiscernible as one traveled toward it." It was so charged in sub-paragraph 9 (a) of the plaintiffs' com-

plaints, but, as pointed out on pages 68 to 70 of the defendant's petition and brief, was never proven. It is quite significant that the plaintiffs have not referred this Court to any place in the record for proof of this charge. Furthermore, the proof shows that the occurrence took place in the nighttime. Under such circumstances it would be the lights on the rear of the truck and not the truck itself that would be observable by a driver approaching from the rear. The plaintiffs proved that the lights on the truck were burning, but that they did not see them.

It is, therefore, respectfully submitted that the plaintiffs' supplemental statement of facts adds nothing material or pertinent to the facts as stated in the defendant's petition and brief; that the plaintiffs' conclusions are unsupported by any proof, and that they have failed to point to any evidence in the record which even tends to justify the misstatements of fact made by the Circuit Court of Appeals.

ARGUMENT.

I.

Whether or not the writ will be granted is within the sound judicial discretion of this Court.

Careful consideration was given to the provisions and requirements of both the statute and Rule 38 (5) of this Court, before the defendant's petition was filed. It is true, of course, that the writ of certiorari should be granted only where there are special and important reasons therefor. It is also true that the writ is not a matter of right, but of sound judicial discretion. But, it is respectfully submitted, that where, as here, the Circuit Court of Appeals has overlooked or misapprehended the controlling facts in some twelve or more particulars, none of which opposing counsel has even attempted to justify from the record or to demonstrate were not material to the Court's decision, sufficient special and important reasons exist for the granting of the writ. It is also respectfully submitted that where, as here, the errors in this regard were brought to the attention of the Circuit Court of Appeals (Tr. 529-553) and that court has refused to correct them (Tr. 555), such court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as is suggested by the rule in question.

Nor is counsel's assertion that "this is an ordinary negligence case," etc., a ground for denying the writ. A consideration of negligence cases is not excluded by the rule. This Court has considered them on many occasions. Furthermore, counsel's assertion that the case

"involves nothing except the usual ordinary issues of fact in negligence cases," etc., is merely an attempt to side-step the issues involved. The issues raised by the defendant's petition present not questions of fact, but questions of law: Whether the evidence is sufficient to sustain the verdict and whether the law as laid down in the opinion of the Circuit Court of Appeals is in conflict with the law of Illinois as laid down in its court decisions and statutory enactments. It is respectfully submitted that where, as here, the Circuit Court of Appeals has failed to follow the law of Illinois, the state in which the occurrence took place and in which the trial was had, such failure furnishes sufficient reasons, under the rule, for the issuance of the writ.

II.

The Circuit Court of Appeals failed to follow the law of Illinois.

Under Point II of the defendant's brief it is pointed out that it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions; that under the law of Illinois the burden is on the plaintiff to prove freedom from contributory negligence on his part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of the injury. It is further pointed out that under the law of Illinois, a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture as to what may or may not be the facts. We believe these propositions of law were correctly stated in cases cited and quoted from. Counsel for the plaintiffs has not disputed them. He has merely asserted that the Circuit Court of Appeals has followed the well-established law that the existence

of negligence, freedom from contributory negligence, and proximate cause are questions of fact for the jury. But such is not the law of Illinois. The existence of negligence, freedom from contributory negligence and proximate cause, under the law of Illinois, are never questions of fact for the jury unless and until the plaintiff has sustained the burden of producing some positive affirmative proof of each of them. If the plaintiff fails to produce any such proof as to any one of them, the defendant is entitled to a directed verdict. The same is true where the plaintiff's proof disproves any one of them. In the case at bar the plaintiffs not only failed to produce any proof of freedom from contributory negligence on their own parts, but, on the contrary. proved themselves to be guilty of contributory negligence. Not only is this true, but, as pointed out in defendant's brief (pp. 67-80), the plaintiffs failed to produce any evidence which tends to prove any of the charges of negligence laid in their complaints. Under these circumstances, it was the duty of the trial court to direct verdicts for the defendant and the Circuit Court of Appeals was in error in refusing to so hold.

Counsel states: "No motion for new trial was made and no error is alleged in the court's rulings on evidence or the giving or refusal of instructions." But that is, of course, immaterial. The defendant was not asking for a new trial, but for directed verdicts or judgments notwithstanding the verdicts. The plaintiffs failed to make out their cases and whether or not there were errors committed on the trial is of no importance. While there may have been some conflict in the decisions of the Federal Courts, before the Rules of Civil Procedure were promulgated, as to whether a defendant's remedy was limited to a new trial where the trial court was in error in refusing to direct a verdict, under the decisions of this Court, particularly since the promulgation of

these rules, as well as under the practice of Illinois, the defendant's remedy is not so limited and a motion for judgment notwithstanding the verdict is the proper procedure for the correction of such error.

Counsel further states that "defendant had failed to preserve in the printed record the instructions given or refused and the inference from such failure necessarily must be that the trial court followed the rule of *Erie R. Co.* v. *Tompkins*," etc. Such an inference could not, of course, either logically or legally follow. The error on the part of the trial court in refusing to direct verdicts for the defendant could not be cured by the instructions given to the jury, no matter how accurate or complete such instructions may have been. A motion to direct raises purely a question of law for the trial court and not a question of fact for the jury, and it is not the province of the jury to correct the error of the trial court in overruling such motion by bringing in the proper verdict under the instructions of the court. If the jury had brought in such verdicts, the plaintiffs, of course, could not complain, but since they did not, the defendant is not to be precluded by their verdicts from its remedy. Under the issues here, the instructions, given or refused, by the trial court are not a necessary or even a proper part of the record.

It is, therefore, respectfully submitted that counsel's assertion that the Circuit Court of Appeals followed the law as laid down by the courts of Illinois is not correct and that the arguments advanced in support thereof are unsound.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

On pages 23 to 33 of the defendant's petition and brief, Point I of the Argument, are pointed out some twelve or more instances in which the Circuit Court of Appeals overlooked or misapprehended the controlling facts as shown by the plaintiffs' proof and wherein the court misstated or misconstrued the evidence. In many of these, the statement made by the court is not only directly contrary to the plaintiffs' proof but most favorable to the plaintiffs' supposed causes of action. In others, positive, affirmative proof made by the plaintiffs, from which the only logical inference to be drawn is that they were guilty of contributory negligence, was wholly overlooked or ignored by the court, as, for example, the fact that the car in which they were riding skidded a distance of 75 feet, in a straight line, on a dry pavement, before it came into contact with the defendant's truck and at the time of the collision was still traveling, according to their own estimates, at a speed up to as high as 25 miles per hour.

It is quite significant that the plaintiffs have not, in their supplemental statement of facts, or elsewhere in their brief, claimed these facts to be as stated by the Circuit Court of Appeals. They have not even attempted an answer to Point I of the defendant's argument. They have not even suggested that these misstatements of the facts are immaterial or are not the controlling factors upon which the court based its decision. The plaintiffs' silence with respect to these misstatements is, we repectfully submit, a tacit admission that they cannot be justified from the record.

Nor has counsel for the plaintiffs pointed to any evidence in the record tending to prove any of the essential elements of their case. On the contrary, he has merely quoted from a few cases (Plaintiffs' Brief 9-12) wherein it is held that if there is evidence fairly tending to support a plaintiff's case, the case must be submitted to the jury; summarized in a somewhat perfunctory manner the charges laid in the complaints; and referred the court to paragraph 13 of the opinion of the Circuit Court of Appeals in which the question of the plaintiffs' contributory negligence was not even considered.

The cases cited by counsel have no application to the situation in the case at bar. It is, of course, the law that where the plaintiff has produced some evidence fairly tending to prove the essential elements of his case, even though the defendant produces evidence which is in conflict therewith, the case must be submitted to the jury. But whether or not the plaintiff produced any such evidence is a question of law for the court on a motion to direct. Under the law of Illinois, as is pointed out in defendant's brief, the plaintiffs must first of all sustain the burden of producing some evidence fairly tending to prove that before and at the time of the occurrence they were in the exercise of ordinary care for their own safety. And where, as here, the plaintiffs failed to sustain that burden, there was no question of fact to submit to the jury and verdicts should have been directed for the defendant. Had there been any such proof, counsel, by a simple analysis of the evidence, could have easily pointed it out. He has, however, made no attempt to do so. The plaintiffs not only failed to produce any such proof, but, on the contrary, the proof produced by them shows that they were guilty of contributory negligence as a matter of law.

Nor can the plaintiffs relieve themselves of the burden

of proving their freedom from contributory negligence by charging, in their complaints, that the defendant was negligent. The fact, as pointed out by counsel, that there were eight charges of negligence laid in the complaints does not change the situation. Even had they proved all of these charges,—they proved none of them (See petition and brief, pp. 67-80),—they would still not be entitled to have the cases submitted to the jury since they failed to produce any proof of their own freedom from contributory negligence.

Nor does what the Circuit Court of Appeals said in paragraph 13 of its opinion, to which this Court is referred, change the situation. As is pointed out above, the court did not even consider the question of the plaintiffs' freedom from contributory negligence in this paragraph of its opinion. It is devoted wholly to a consideration of whether or not the plaintiffs proved any of the charges of negligence laid in their complaints. It will be noted also from this paragraph of the court's opinion and from the opinion as a whole, overstated as the facts are in favor of the plaintiffs, that the court was unable to point to any evidence tending to prove any of the charges laid in the plaintiffs' complaints and that the court was laboring wholly in the field of surmise or conjecture as to which, if any, of the charges the evidence tended to sustain. Had there been any evidence to support any of the essential elements of the plaintiffs' cases, the court would have had no difficulty in pointing it out. The court was able to point to none. Its conclusions are based wholly on speculation and conjecture as to what was the cause of the occurrence complained of and not on proven facts. Where the proof is in such a state, under the law of Illinois, the verdicts for the plaintiffs cannot stand.

The controling facts in the case at bar do not differ from those in the case of *Cooney* v. *F. Landon Cartage*

Co., 308 Ill. App. 444, considered in the defendant's petition and brief, beginning on page 37. Counsel for the plaintiffs disputes this (Br. 13), but, we submit, his attempt to distinguish them is without merit, and in several respects he has misstated them. In the *Cooney* case the court held that the plaintiff could not recover on the ground that the deceased was guilty of contributory negligence. Counsel states that it was proven in that case, and not here, that the lights on the truck were visible approximately 500 feet away. If the lights on the defendant's truck in the case at bar were not visible for that distance, as required by statute, the burden was on the plaintiffs to prove such to be the case. They made no such proof. Counsel states there was nothing to impair visibility. That was true in the case at bar. Both accidents happened in the nighttime. The plaintiffs' proof in the case at bar is that the weather was clear and that the pavement was dry (Tr. 92, 104, 225, 248), and that there was nothing to interfere with their visibility. If counsel is merely referring to the supposed smoke or fog at the place of the accident, that, too, was visible to the plaintiffs, as well as the lights from the fusees, according to their testimony, quite some distance before they approached the place of the occurrence. The plaintiffs in the case at bar were not in as good a position to claim they were in the exercise of ordinary care as the deceased in the *Cooney* case, since they were forewarned by these lights and this supposed smoke or fog that something was wrong ahead. Counsel states that the defendant's driver in the *Cooney* case was forced to leave his truck standing, having run out of gas. But the reason for stopping the truck could have no bearing whatever on the question of the plaintiffs' contributory negligence. Counsel states that in the *Cooney* case the plaintiff's car at the time of the collision was traveling some 45 to 70 miles per hour, at the

time of the collision. A reading of the opinion in that case does not bear this out. The proof is that it had been traveling at that speed, but that was before it skidded the distance of 100 feet. The plaintiffs in the case at bar conceded they were traveling about 45 miles per hour (the defendant's proof showed it to be much higher (Tr. 360)) as they approached the place of the occurrence, and that they skidded a distance of 75 feet before colliding with the defendant's truck. It might also be noted here that the car in the *Cooney* case skidded on a frozen pavement, while the car in the case at bar skidded the distance of 75 feet on a dry pavement. Apparently there could have been no material difference in the speed at which the cars were being driven in the two cases.

Near the bottom of page 13 of the plaintiffs' brief counsel states that the plaintiffs were traveling at a speed of 15 to 20 miles per hour. This, we respectfully submit, is a misstatement of the fact. Counsel has not referred the court to the record for any testimony supporting this statement. The plaintiffs' proof is that it was traveling at that or a greater rate of speed at the time of the impact, after skidding this distance of 75 feet (Tr. 144, 149, 169, 234).

There can be no question that if the plaintiff's deceased in the *Cooney* case was guilty of contributory negligence barring a recovery, the plaintiffs in the case at bar were equally guilty. But the *Cooney* case is not the only Illinois case on facts similar to those in the case at bar. It follows a long line of Illinois cases to the same effect, some of which are cited and quoted from in the defendant's petition and brief (pp. 39-46). The decision of the Circuit Court of Appeals in the case at bar is not only in conflict with, but directly contrary to, the established law of Illinois as laid down in these cases.

Furthermore, the court, by its decision has, contrary to the established law of Illinois, sanctioned the practice of submitting the case to the jury on proof of the plaintiffs' contributory negligence. The opinion of the court is not, however, very clear on its reasons for so doing. It may be that the court had in mind the doctrine of comparative negligence which prevails in some states of this circuit, such as the state of Wisconsin. But the doctrine of comparative negligence does not prevail in Illinois. *West Chicago St. Ry. Co.* v. *Linderman,* 187 Ill. 463 at 468; *Chapin* v. *Foege,* 296 Ill. App. 96 at 100.

The case of *Skamenca* v. *Reeser,* 294 Ill. App. 216, relied upon by the plaintiffs, has little, if anything, in common with the case at bar, either on the facts or on the pleadings. In that case the plaintiff and defendant were approaching each other from opposite directions on a two-lane highway. The occurrence took place in the nighttime and it was damp and foggy. Visibility was very poor. There was a conflict in the evidence with regard to the side of the highway on which the cars were traveling at the time of the collision. The trial court granted a new trial on the ground that erroneous instructions were given at the request of the defendant. The appeal was from this order. The court held that under the evidence the instructions were erroneous and affirmed the order granting a new trial. The difference between that case and the case at bar is obvious. In that case the fog was a continuing condition through which both the plaintiff and the defendant were forced to travel on a narrow highway. In the case at bar the supposed smoke or fog was local and according to the plaintiffs' own testimony was observed by them when they were some 200 feet distant from it. Their proof shows that although they were aware of its presence, without decelerating their speed to any considerable extent, they plowed into it at such a speed that after

skidding a distance of 75 feet on a dry pavement they were still traveling at a speed as much as perhaps 25 miles per hour at the time of the collision. The holding in the *Skamenca* case furnishes no support for their contention that they were not guilty of contributory negligence.

In the case of *Mapes* v. *Hulcher,* 363 Ill. 227, also relied upon by the plaintiffs, the facts bear little, if any, resemblance to those in the case at bar. In that case the accident happened in the nighttime, it was snowing, and visibility was limited and difficult. The defendant's truck had stopped at the bottom of a hill or incline. The highway was a two-lane highway. The defendant's truck was disabled and the evidence was conflicting as to whether there were any lights on its rear. The driver of the car in which the plaintiff was riding was driving with his head out of the window, watching the road as best he could under difficult circumstances. The windshield was more or less covered with snow, but the plaintiff's proof showed that she was doing her best to watch the road by looking through a small clear space at the bottom of the windshield. This case, we submit, furnishes no authority for the plaintiffs' contention that under the proof they adduced, they were in the exercise of ordinary care at the time of the occurrence complained of.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with dim lights only, particularly when the bright lights were available.

According to the testimony of the plaintiffs, none of them saw the defendant's truck until just shortly before the car in which they were riding collided with it. As an excuse for this failure, it was contended on the trial that their vision was obscured by the supposed smoke or fog created by the burning fusees. They were in

wide disagreement as to the extent their vision was obscured, but in agreement that it was obscured. They were in agreement also that the car in which they were riding was being driven with the dimmer lights. They produced no evidence whatever as to what extent the highway was lighted up, or objects ahead could be discerned by the use of these lights. On cross-examination, Miller, the driver, and Foster, who was seated in front with him, would not even venture an estimate of how far these lights lighted up the pavement ahead. They testified that the car was equipped with bright lights, but that they were never turned on.

Counsel for the plaintiffs has not attempted to justify the failure of the plaintiffs to make use of the brighter lights. He has merely referred the court to two cases in which the Appellate Court of Illinois has held that, under the circumstances and local conditions shown by the evidence in these cases, the question of whether or not the driving of the cars with the dimmer lights was the proximate cause of the occurrence was properly submitted to the jury. But the facts in those cases bear little, if any, analogy at all to the fact in the case at bar. In the case at bar the plaintiffs, according to their testimony, were aware of this supposed smoke or fog when they were quite some distance away from it. They knew, according to their testimony, it would obscure their vision when they entered it. They drove through some 200 feet of it during which their vision was obscured. They must have known from the presence of the fusees and this supposed smoke or fog that something was wrong at this place on the highway. Common prudence would have dictated that if they were unable to see with these dimmer lights they should have made use of the brighter lights in order to determine what was ahead of them. They offered no proof that the use of the brighter lights would have been of no avail or any excuse for their failure to make use of them.

3. If the "smoke," "fumes," "fog," or "smudge," from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

Counsel's answer to this point is merely that "the plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed." Such, of course, is not the law and particularly under the circumstances shown by the plaintiffs' proof. Nor is it a correct statement of the law even if it were conceded, which it is not, that the defendant was unlawfully obstructing the highway. The law in this respect is lucidly pointed out by the Supreme Court in the case of *Schlauder* v. *Chicago & Southern Trac. Co.*, 253 Ill. 154, where the court say at page 159:

> "There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. (Citing cases) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances, nor relieve a carrier of passengers from the duty of exercising that degree of care demanded by the law in view of the circumstances and surroundings. One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. *No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care.*" (Italics ours.)

Under the law as laid down in this case, the plaintiffs cannot excuse their negligence by merely contending that the defendant was negligent.

Nor is there any law in Illinois requiring the driver of a motor vehicle upon the highway to keep out of the way of a vehicle approaching from his rear. As was said in the case of *Hogrefe* v. *Johnson,* 271 Ill. App. 469, cited and quoted from in defendant's brief, at page 473:

> "The rights of persons operating automobiles upon public highways are equal and their duties towards one another are reciprocal; and persons operating automobiles upon the public highways, if in the exercise of ordinary care, should be on the alert for other cars upon the highway. Persons operating automobiles are chargeable with notice that others are to be expected to be using such highway, and they owe a mutual duty to each other to exercise reasonable care to avoid collision."

Furthermore, the reason for four-lane highways, such as the one in question, is that vehicles do not travel at the same rate of speed upon the highway, and the additional lane enables those approaching from the rear to pass the slower moving vehicles. The plaintiffs must be charged with the knowledge of the law of the road that the slower moving vehicles should keep to the outer lane. Yet with this knowledge, with the knowledge that there was something wrong at this point on the highway, with their vision obscured by the supposed smoke or fog, and without decreasing their speed to any considerable extent, they proceeded through this supposed smoke or fog on this outer lane, where slow moving vehicles could be expected to be, at a rate of speed so great that they were unable to stop after skidding a distance of 75 feet. It is not the law, as counsel assert, that the plaintiffs had a right to assume that the highway ahead of them was unobstructed, whether lawfully or unlawfully, "and

their actions after entering the area of smoke and glare" were not those of reasonably prudent men, as counsel contends.

The facts in the cases cited and quoted from by counsel for the plaintiffs in support of this proposition bear little, if any, resemblance to those in the case at bar. In the case of *Sidle* v. *Baker,* 52 Ohio App. 89, the accident happened at night. Snow and sleet were falling, obscuring the vision. The paved portion of the highway was only 16 or 18 feet wide. After driving over the brow of a hill, the defendant stopped, with the left front of his car over the center line of the pavement, for the purpose of cleaning the ice from his windshield. A second car came over the brow of the hill and, observing a car approaching from the opposite direction, attempted to stop, but was forced to run off onto the shoulder and stopped parallel with the defendant's car. About that time the plaintiff came over the brow of the hill and, observing the oncoming car, attempted to stop without colliding with the other cars, as a result of which he overturned in the ditch. In that case the defendant's stopping just over the brow of the hill created a sort of trap for the plaintiff and the other car which was following him. The plaintiff had no reason to suspect any danger until he arrived at the top of the hill and found the distance between him and the cars ahead too short for him to come to a stop. In the case at bar the highway was straight and level and there was no hill to interfere with the plaintiffs' view. The plaintiffs had many visible signs of danger, had they looked. There were the lights burning on the defendant's trucks. There was a string of fusees and torches stretched along the road. There was a string of trucks parked along the highway for a distance of some 200 feet. There was the supposedly dense smoke or fog, cutting off their vision. There were many things to warn them that they

must proceed with caution and had they done so there would have been no collision.

In the case of *Body Fender & Brake Corp.* v. *Matter*, 172 Va. 26, quoted from by counsel, defendant's tow truck was being used to pull a large, heavy truck, which had run off the highway into the sand, back onto the pavement. Here the highway was also a two-lane highway. The tow truck was standing diagonally across the plaintiff's traffic lane in such a manner that the lights were not visible to the plaintiff. There were a number of cars approaching from the opposite direction, some of which had dimmed their lights and others that had not. The plaintiff had dimmed his lights for the benefit of this traffic. Failing to see the defendant's tow truck, he collided with it. The defense was that the defendant's helper was attempting to warn traffic with a flash light. The evidence concerning this, however, was in conflict. The facts in that case bear no analogy to those in the case at bar. One of the causes of the collision in that case was the lack of room in which to pass the tow truck because of the oncoming traffic. In the case at bar there was no oncoming traffic and the plaintiffs had three clear traffic lanes in which they could have passed the defendant's truck, had they only looked.

In the case of *Moyer* v. *Vaughan's Seed Store*, 242 Ill. App. 308, the defendant's truck was stalled on one of the traffic lanes of a two-lane highway. There was some conflict as to whether it had any lights burning on its rear, but it appears from the evidence that it did not. The plaintiff, who was traveling in the same direction as this truck, dimmed his lights for a truck approaching from the opposite direction. As he switched on the brighter lights he discovered the truck ahead of him, but too close for him to stop without colliding with it.

It will be noted that in each of these cases relied upon by the plaintiffs the occurrence took place on a two-lane

highway; the defendant's vehicle was unlawfully parked, or without lights; there was traffic approaching from the opposite direction; and the plaintiff was caught in a trap which he could not avoid. In the case at bar none of these circumstances were present and the occurrence would have been avoided if the plaintiffs had exercised only the slightest amount of care.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

When the defendant's petition and brief was prepared it was assumed that it would be contended, as it was below, that even if the court found that the plaintiff, Miller, the driver of the car in question, failed to prove the exercise of ordinary care on his part, or was guilty of contributory negligence as a matter of law, the court might find differently as to the other plaintiffs, or some of them, since they were merely passengers in the car driven by the plaintiff, Miller. This contention of the plaintiffs was based on the well established principle of law in Illinois that the negligence of the driver of a car is not imputable to a passenger therein unless such driver is the agent of such passenger, and that it is only his own negligence or his failure to exercise ordinary care, that can be considered in an action brought by such passenger.

But as is pointed out in defendant's petition and brief (pp. 55 to 58), it is an equally well established principle of law in Illinois that where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it. As is also pointed out in this section of the defendant's brief, the other plaintiffs, particularly the plaintiff Foster, who was seated in the front seat, had as good an opportunity as did the plaintiff,

Miller, to observe the situation and to learn of the approaching danger and to take steps to avoid it; that they failed in this regard; and that they, as well as the plaintiff, Miller, were guilty of contributory negligence as a matter of law.

Since counsel for the plaintiffs has not contended here that any of the passenger plaintiffs is in a more favorable position or is entitled to any more favorable consideration than is the plaintiff, Miller, and has made no answer to this part of the defendant's argument, it must be assumed that he concedes that if the plaintiffs' proof failed to show that the plaintiff, Miller, was in the exercise of ordinary care for his safety or was not guilty of contributory negligence, the same is true with respect to the passenger plaintiffs.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

Counsel's main contention here seems to be that the defendant violated Section 88 of the Uniform Act Regulating Traffic on Highways. The essential part of this statute is set out on page 76 of the defendant's petition and brief and also on page 29 of the plaintiffs' brief. It will be noted that this statute is merely a traffic regulation applying only to highways outside of a business, residence or suburban district. It has no application to a highway within the corporate limits of a city, village or incorporated town. It will also be noted that the statute does not purport to absolutely forbid stopping a vehicle "upon the paved or improved or main traveled part" of the highway, but only when it is practical to stop, park, or leave it off such part of the highway. It will also be noted that this statute provides that in case a vehicle is stopped on the highway it is required to leave a clear and unobstructed width of at least 20 feet op-

posite such vehicle for the free passage of other vehicles, etc. It will also be noted that this statute does not create a cause of action on behalf of any person who may collide with such vehicle when stopped. It is respectfully submitted that under the plaintiffs' proof the defendant did not violate this statute. The proof shows that a truck, similar in size and weight, had mired down into the shoulder on the opposite side of the highway to such an extent that it was unable to get back onto the pavement. From this fact alone it is not only reasonable and logical to conclude, and for the defendant's drivers to so conclude, that it was not "practical" for trucks such as the defendant's, to stop off the pavement. Plaintiffs' proof also shows that there was a "clear and unobstructed width" of not only at least 20 feet, as required by the statute, but more than 30 feet left for the free passage of other vehicles. The defendant's drivers fully complied with the requirements of this statute.

But assuming, which we do not concede, that there was a technical violation of the statute on the part of the defendant's drivers, still, under the law of Illinois, such violation would only be *prima facie* proof of negligence and the plaintiff would still be required to prove that such violation was the proximate cause of the occurrence complained of. Counsel for the plaintiffs has pointed to no such proof. He has merely cited and quoted from a few cases in which, under the facts peculiar to those cases, the evidence tended to prove that the stopping of the vehicle was the proximate cause of the occurrence.

But the facts in these cases are not analogous at all to the facts in the case at bar. The single fact that in each of the cases cited by counsel for the plaintiffs the occurrence took place on a two-lane pavement instead of a four-lane pavement distinguishes them from the case at bar. The purpose of the statute being to ex-

pedite traffic on the highway, it is obvious that there are many things which a driver must do in order to comply with it when traveling upon a two-lane highway which would not be required when traveling upon a four-lane highway. For example, the driver upon a two-lane highway could not stop upon the pavement and at the same time leave a width of 20 feet for the passage of other vehicles. If it were not practical for him to pull off the pavement at a given place, it would necessitate his continuing on to a place where he could do so before stopping, a requirement which would not be necessary at all on a four-lane highway. It may be possible to conceive of traffic conditions on a four-lane highway being such that a driver, in order to comply with the requirements of this statute, might be required to continue on to a place where it is practical to drive off the pavement before stopping, but the plaintiffs' proof in the case at bar fails entirely to show any such condition. Their proof is conclusive that there was at least three clear traffic lanes in which they could have passed the defendant's truck, had they been at all observant, and that there was no traffic approaching from the opposite direction.

Thus, in the case of *Rhoden* v. *Peoria Creamery Co.*, 278 Ill. App. 452, relied upon by counsel for the plaintiffs, the defendant's truck was traveling on a two-lane highway, and due to a broken pin in the timer was stopped upon one of the traffic lanes. A second truck following came to a stop or nearly to a stop behind the defendant's truck. The driver of the car in which the plaintiff was riding and which was following the trucks attempted to turn into the other lane to pass the trucks, but was blocked by a car coming from the opposite direction. In attempting to swerve back into its own traffic lane it collided with the second truck. The facts are so obviously different from those in the case at bar as to require no comment.

The case of *Emrick* v. *Phillips,* 134 Pa. Sup. 45, also relied upon by counsel for the plaintiffs, involves only a two-lane highway. In that case the defendant brought his tractor and trailer to a stop on the pavement, but in doing so he not only blocked his own traffic lane, but the buckling of the tractor and trailer forced the front end of the trailer over the center line of the pavement so that it obstructed the other traffic lane to some extent. The plaintiff in attempting to pass the truck on the other lane was blinded by the lights of an oncoming car and collided with that part of the trailer protruding into that lane. The facts in that case bear no analogy to the facts in the case at bar.

With regard to the cases of *Fitzpatrick* v. *California & Hawaiian Sugar Ref. Corp.,* 309 Ill. App. 215; *Bos* v. *Richards,* 71 Fed. (2d) 262; *Moyer* v. *Vaughan's Seed Stores,* 242 Ill. App. 308; *Mapes* v. *Hulcher,* 363 Ill. 227, enough has already been said to distinguish them from the case at bar. Suffice it to say here that in each of them the occurrence took place on a two-lane highway and not on a four-lane highway as in the case at bar and that the facts are so different that the rules of law governing the decisions in those cases could have no application to the facts in the case at bar.

This is not a case where it is contended that the collision was caused by the stopping of the defendant's trucks. Counsel for the plaintiffs insists that the trucks had come to a stop some 3 or 4 minutes before the collision occurred (Br. 3). The plaintiffs' complaint is that they were injured because of the presence of the trucks on the highway and not as a proximate result of their stopping. But as is pointed out in defendant's petition and brief, pages 59-65, the presence of the defendant's trucks on the highway merely furnished a condition by which the collision was made possible and was not the

proximate cause of the occurrence. The proximate cause of the occurrence was the negligence of the plaintiffs in failing to observe the presence of the trucks in question in ample time to avoid the collision and in failing to have their car under sufficient control to pass them after they had observed their presence. The plaintiffs' proof that the car in which they were riding skidded a distance of 75 feet before it collided with the defendant's truck shows that the driver had ample space in which to avoid it had he been driving at a reasonable rate of speed, and that whether the truck was standing or moving was not a controlling factor as to the cause of the collision. It was not the presence of the defendant's trucks on the highway that was the proximate cause of the collision, but, on the contrary, the negligence of the plaintiffs.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

Under Point IV of the defendant's argument (Pet. & Br. 67-80) it is pointed out that eight separate charges of negligence are set up in the plaintiffs' complaints. It is also pointed out that each of these is a charge of specific negligence. Counsel for the plaintiffs concedes that these charges are specific (Br. 11). It is not contended in the plaintiffs' brief that any of these charges are charges of general negligence, as stated by the Circuit Court of Appeals in the thirteenth paragraph of its opinion. It must, therefore, be taken as conceded that the Circuit Court of Appeals was in error in this statement.

Under the law of Illinois, before the plaintiffs were entitled to recover, it was incumbent upon them to prove one or more of these specific charges of negligence. If

they failed in this they are not entitled to recover, no matter what their proof may show.

Each of these charges is set up in full in the defendant's brief and considered seperately. As is pointed out, the plaintiffs failed to produce any evidence tending to prove any of these charges and, on the contrary, produced evidence which disproved most of them. Counsel for the plaintiffs has made no answer to this section of the defendant's brief. He has merely contented himself by asserting that the defendant was negligent, without attempting to point out wherein the defendant was negligent or to point to any evidence tending to prove any of the charges laid in these complaints. It does not appear from the plaintiffs' brief which, if any, of the charges it is contended has been proved. In fact, the applicability of the evidence to the charges laid in the plaintiffs' complaints has been practically, if not wholly, ignored.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

Counsel's argument that there was no variance is merely an attempt to evade the truth by a rule of pleading which, under the plaintiffs' proof, could have no application. It is, of course, a familiar rule of pleading, that allegations of facts in a complaint which are not denied in the answer are assumed to be admitted for the purposes of the trial and need not be proven. But this rule does not cover the situation in the case at bar. The plaintiffs alleged that the accident happened at a certain point on the highway and outside the corporate limits of any city, village or incorporated town. This

allegation was not specifically denied by the defendant. Under this rule of pleading, the plaintiffs need not have proven these allegations. The plaintiffs, however, did not leave the place of the occurrence unproven, but, on the contrary, produced proof which showed conclusively that these allegations in their complaints were untrue; that the accident did not happen at the place where it was alleged to have happened, but at a place a mile or so farther north on the highway and at a point which the map introduced in evidence showed was within the corporate limits of the Village of Glencoe. It is true that the trial court ruled that all designations as to what was not incorporated territory should be stricken from the map and instructed the jury to disregard them, but this was on the erroneous theory that the pleadings were to control and not the plaintiffs' proof. The map, however, remained in evidence, and this action of the court could not cure the variance. The plaintiffs had alleged that the occurrence took place at a certain point on the highway and their proof showed that such was not the fact; that it happened at an entirely different place. It is quite significant here that counsel has not urged that the trial court instructed the jury to disregard any reference on the map to the Village of Glencoe for the reason that the court considered the map unreliable as stated by the Circuit Court of Appeals in the tenth paragraph of its opinion. It must be conceded, as the record shows, that the action of the trial court was based solely on the erroneous theory that the pleadings and not the proof were controlling.

A motion to direct on the grounds of variance is somewhat different from a motion to direct on the grounds of the insufficiency of the proof, since it must be made in the course of the trial, in order to give the plaintiff an opportunity to amend.

The law is well settled in Illinois, as pointed out on pages 83 and 84 of the defendant's brief, that where the variance is pointed out on the trial, and the plaintiff refuses to amend his pleadings to conform to his proof, a motion to direct should be sustained.

In closing his argument, counsel states that even if a variance could be considered to exist, there were eight specifications of negligence, at least five of which pertained to both incorporated and unincorporated areas and any one of which is sufficient to sustain the verdicts. Counsel's statement, however, is not in accord with the law. The rule that one good count is sufficient to sustain a verdict is applicable only when all of the counts state a cause of action, where there is evidence to support the good count, and no motion made for directed verdicts as to the other counts. The rule in this regard is very lucidly stated in *Robbins* v. *Illinois Power & Light Corp.*, 255 Ill. App. 106, where the court, after reviewing a large number of authorities, say at page 124:

> "In all of these cases, including *Grinestaff* v. *New York Central R. Co., supra,* where there are counts in the declaration of an independent nature, varying in the form of liability, a request for a peremptory instruction to direct a verdict for the defendant presents a question of law as to there being any evidence in the record in support of the verdict, and the doctrine that a verdict may be supported by one good count does not apply, especially in those cases where an issue is submitted to the jury that is without evidence to support it."

In the case at bar the defendant not only called the court's attention to the variance, but moved the court for leave to file an amendment to the answer setting up the facts as to the place of the occurrence as shown by the plaintiffs' proof (Tr. 372); moved the court to direct

verdicts for the defendant on the ground of the variance (Tr. 460); and moved the court separately to find the defendant not guilty as to each of the several charges laid in the plaintiffs' complaints (Tr. 473-480). But the trial court overruled each of these motions. Counsel for the plaintiffs, however, not only resisted each of these motions, but failed and refused to amend the complaints to speak the truth as shown by the plaintiffs' own proof.

It is, therefore, respectfully submitted that counsel's contention that the variance is neither material nor fatal is not well taken. If it is immaterial here, it becomes so only for the reason, as pointed out above, that the plaintiffs failed to produce any evidence tending to prove any of the charges laid in their complaints.

CONCLUSION.

In conclusion, your petitioner respectfully submits that the plaintiffs have not justified the errors of the Circuit Court of Appeals pointed out in its petition and brief; that the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the plaintiffs' own proof; that in its refusal to correct its misstatement of the facts it has departed from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision; and that it has decided important questions of local law in conflict with local statutes and the applicable local decisions, as is suggested as grounds for the writ by Rule 38 (5) of this Court.

Your petitioner, therefore, prays that this Honorable Court may grant its petition for writ of ceritiorari in the said cause to the end that the said cause may be reviewed

and determined by this Court and the errors committed by the Circuit Court of Appeals and by the trial court may be corrected.

Respectfully submitted,

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